SUPREME COURT, U. S.

Supreme Court of the United States

OCTOBER TERM, 1968

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No. 1045

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of Local 144, Hotel & Allied Service Employees Union, Service Employees International Union, AFL-CIO,

Appellant,

against

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

IN THE MATTER OF

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of Local 144, Hotel & Allied Service Employees Union, Service Employees International Union, AFL-CIO,

Appellant,

against

THE LONG ISLAND COLLEGE HOSPITAL

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS APPEAL

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INDEX

	PAGE
Relevant Statutory Provisions	2
Statement of the Case	4
The Claimed Federal Questions	5
Argument:	
I. The Federal Questions that Appellant Presents Are Hypothetical and There Is No Case or Controversy Involving Them	6
II. The State Court Did Not Pass On the Questions the Appellant Is Trying to Raise and Their Resolution Was in No Way Pertinent to the Court's Decision	8
III. Appellant Did Not Raise the Alleged Federal Questions at the Earliest Opportunity in the State Court	9
IV. The State Court Did Not Pass On the Validity of any Section of New York's Labor Law to Which Appellant Refers in the Questions It Presents on this Appeal	10
Conclusion	11
Appendix (Relevant Statutory Provisions)	A 1

TABLE OF AUTHORITIES CITED

CASES

Asbury Hospital v. *Cass County*, 326 U. S. 207 (1945)	7
Beth-El Hospital v. *Robbins*, 186 Misc. 506, 60 N. Y. S. 2d 798 (1946)	3
Ferry v. *King County*, 141 U. S. 668 (1891)	11

	PAGE
Honeyman v. *Hanan*, 300 U. S. 14 (1937)	9
Jewish Hospital of Brooklyn v. *"John Doe,"* 252 App. Div. 581, 300 N. Y. Supp. 1111 (1937)	3
Longshoremen's Union v. *Boyd*, 347 U. S. 222 (1954)	7
Lynch v. *New York*, 293 U. S. 52 (1934)	9
Mount Sinai Hospital v. *Davis*, 17 Misc. 2d 727, 188 N. Y. S. 2d 338 (1959)	3
Oil Workers Unions v. *Missouri*, 361 U. S. 363 (1960)	9
Society of New York Hospital v. *Hanson*, 185 Misc. 937, 59 N. Y. S. 2d 91 (1945), *aff'd*, 272 App. Div. 998, 73 N. Y. S. 2d 835 (1947)	3

STATUTES

New York Labor Law:	
Section 702(9)	A 1
Section 703	2, A 1
Section 704	2, A 1
Section 705	2, A 2
Section 706	4, 5, A 4
Section 707	4, 5, A 4
Section 713	4, 5, 7, A 7
Section 715	3, A 7
Section 716	4, 5, A 8
New York State Labor Relations Act, L. 1937, C. 443	2
National Labor Relations Act:	
49 Stat. 449	2
Section 8 (b)(4)	4
Section 9	3
Section 10	3
28 U. S. C. § 1257 (2)	10

Supreme Court of the United States

October Term, 1968

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MOTION TO DISMISS APPEAL

Appellee, The Long Island College Hospital, a voluntary, non-profitmaking hospital, hereby moves to dismiss the appeal herein on each of the following grounds:

1. The federal questions that appellant claims this appeal presents are hypothetical questions and concern issues that the facts of the cases here involved do not raise.

2. Consequently, the Court of Appeals of the State of New York did not pass on the questions that appellant now wishes to present and resolution of those questions was in no way pertinent to the State court's decision.

3. In any event, appellant did not raise the alleged federal questions at the earliest opportunity in the State courts, but, instead, first raised them on a motion for reargument, notwithstanding that the decision of the New York Court of Appeals could reasonably have been anticipated since it merely adopted the construction of a State statute that appellee continually urged throughout the litigation.

4. Finally, the State court in these cases did not in any way pass on the *validity* of the statute that these cases involve, but merely construed it not to apply in the circumstances the cases present.

Relevant Statutory Provisions

Since 1937, New York has had a State Labor Relations Act or "Little Wagner Act" (L. 1937, C. 443), whose provisions for the most part parallel those of the National Labor Relations Act before its amendment in 1947 (49 Stat. 449). Thus, Section 703 of the State Act conferred on employees the same rights to organize and bargain collectively that Section 7 of the National Act gave them; Section 704, like Section 8 of the National Act, made an employer's re-

fusing to bargain with the "representatives" of his employees an unfair labor practice; Section 705, like Section 9 of the National Act, provided for designating and certifying representatives; Section 706 empowered the State Labor Relations Board to prevent unfair labor practices, including refusals to bargain, and Section 707, like Section 10 of the National Act, provided for enforcing and reviewing orders of the Board. Section 706(1), like Section 10(a) of the National Act, made the State Labor Board's authority to rule on questions concerning representation exclusive.

The original State law, in Section 715, excluded from its application "employees of any charitable, educational or religious association or corporation," including employees of non-profitmaking hospitals. In 1963, however, the legislature amended Section 715 so that, for the first time, unions of such employees (whom the National Act also excluded from its terms) could invoke the State Act to become certified representatives and, without striking or picketing, compel such hospitals to recognize and bargain collectively with them.

It was well settled that, besides being excluded from the coverage of the National and State Acts, unions of hospital employees could not lawfully strike hospitals to force them to recognize unions or to bargain with them. *Jewish Hospital of Brooklyn* v. *"John Doe,"* 252 App. Div. 581, 300 N. Y. 1111 (1937); *Society of New York Hospital* v. *Hanson,* 185 Misc. 937, 59 N. Y. S. 2d 91 (1945), *aff'd,* 272, App. Div. 998, 73 N. Y. S. 2d 835 (1947); *Beth-El Hospital* v. *Robbins,* 186 Misc. 506, 60 N. Y. S. 2d 798 (1946); *Mount Sinai Hospital* v. *Davis,* 17 Misc. 2d 727, 188 N. Y. S. 2d 338 (1959).*

At the same time that it made the procedures of the State Act applicable to hospital employees and their unions,

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* Protagonists of unions of hospital employees are fond of saying that amendments of the State Act requiring voluntary hospitals to bargain collectively with their employees and providing for compulsory arbitration of "disputes" over terms of collective bargaining contracts were the quid pro quo for the "loss" of their right to strike—a right that, as these cases hold, they never had.

the New York legislature, in language it borrowed from the second ("publicity") proviso of Section 8(b)(4) of the National Act, provided in Section 713 that it would continue to be unlawful for such employees and their unions to strike or picket non-profitmaking hospitals, provided that "nothing herein shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public of the existence of" an economic dispute that, by the terms of Section 716, was subject to fact-finding and compulsory arbitration.*

Statement of the Case

On December 28, 1964, nineteen months after appellant Local 144 had petitioned for certification as the representative of "all non-professional employees" of The Long Island College Hospital, the State Labor Relations Board certified it as the representative of certain maintenance employees of the Hospital. The Hospital believed that in these protracted proceedings the Board had committed egregious errors (which included two violations of its own rules and regulations and a holding that 21 votes constituted a majority of 46 votes) that rendered the certification invalid.

In order to obtain, in the only way it could (i.e., by proceedings under Sections 706 and 707), review of the Board's certification, the Hospital advised Local 144 that it was refusing to bargain with the union and offered to cooperate in expediting a determination as to the validity of the certification.

Instead of filing an unfair labor practice charge, Local 144 sought to invoke Section 716 of the Labor Law authoriz-

* Section 716, in providing for the submission of "disputes" to fact-finding and compulsory arbitration, carefully, narrowly and precisely excludes from the ambit of the term controversies over the representation of employees, and Section 702(9) forbids the Industrial Commissioner, who has jurisdiction under Section 716, to deal with such controversies.

ing the Industrial Commissioner of New York to order fact-finding and compulsory arbitration for the settlement of "disputes" as the section narrowly defines that term. The Hospital instituted two proceedings in the New York courts that were consolidated in the Court of Appeals, and from the decision in which Local 144 now seeks to appeal to this Court. In both proceedings, the Hospital contended that the controversy between it and Local 144 concerned the status of Local 144 as the representative of employees of the Hospital; that this controversy was subject to review only in the manner Sections 706 and 707 set forth, and that it did not constitute a "dispute" under Section 716 over which the Industrial Commissioner could assert jurisdiction. Both proceedings therefore involved the question, as the Court of Appeals expressed it (Appellant's Jurisdictional Statement, A. 8):

> "Where a nonprofitmaking hospital challenges the representation status of a union, does section 716 of the New York State Labor Law, enacted in 1963, empower the New York State Industrial Commissioner to appoint a fact-finding commission to make recommendations for the settlement of the dispute and, if its recommendations are rejected, to submit the issues to compulsory arbitration before the New York State Board of Mediation?"

The Court below answered that question in the negative and thereby refused to apply the provisions of Section 716 to the controversy between Local 144 and the Hospital concerning the representation of the employees.

The Claimed Federal Questions

In its Jurisdictional Statement in support of this appeal, appellant maintained that by construing Section 716 of the New York Labor Law as not applying to controversies over representation, the New York Court of Appeals has rendered unconstitutional another and different section of the Labor Law, Section 713, prohibiting strikes and re-

stricting picketing by employees of non-profitmaking hospitals. Appellant further contends that the State Court's construction of Section 716 makes that section, also, an unconstitutionally inadequate substitute for the right to strike and picket that appellant (but not the Court below) construes Section 713 as proscribing. Appellant argues that a non-existent holding of the Court of Appeals imposes on unions of hospital employees "the requirement of compulsory judicial review of their certifications" in violation of the First and Fourteenth Amendments, and that Sections 716 and 713, as the appellant (but no court) construes them, deprive hospital employees of the equal protection of the laws.

ARGUMENT

I. The federal questions that appellant presents are hypothetical and there is no case or controversy involving them.

The foregoing Statement of the Case shows without question that this appeal in no way involves the construction, application, and/or the constitutional validity of Section 713's restrictions on strikes and picketing by employees of non-profitmaking hospitals. There is no evidence that either appellant Union or any employees of the Hospital at any time engaged or attempted to engage in striking, picketing or publicity. Neither the Hospital nor anyone on behalf of the Hospital has attempted to enforce the provisions of Section 713 against appellant or any employees of the Hospital. The decision of the Court of Appeals does not in any way restrict striking, picketing or publicity by the Union over its demand for recognition. In these circumstances, it is clear that appellant, by this appeal, seeks to obtain from this Court an advisory opinion unrelated to the facts of the case, on the constitutionality of Section 713. Indeed, in the very first point of its Jurisdictional Statement, appellant argues (at page 12):

"1. Section 713 of the New York Labor Law as construed by the Court below constitutes an interference with rights guaranteed by the First Amendment."

The Court below did not construe or enforce Section 713. It hardly requires citation of authority to support the proposition that this Court will not entertain a constitutional question in advance of the necessity of deciding it. But this Court's remarks in *Asbury Hospital* v. *Cass County,* 326 U. S. 207, 213-14 (1945) and *Longshoremen's Union* v. *Boyd,* 347 U. S. 222, 223-24 (1954), are particularly applicable to the circumstances of this appeal. In the *Asbury Hospital* case, *supra,* this Court said:

> "We are thus asked to pass upon the constitutionality of a possible application of the state statute in advance of its application to appellant and of its authoritative construction by the state courts. Lacking such construction, without which no constitutional question can arise, the issue is not an appropriate one for adjudication by the declaratory judgment procedure. This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity of deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied. *Federation of Labor* v. *McAdory,* 325 U. S. 450, 459-463, and cases cited."

Again, in the *Longshoremen's* case, *supra,* this Court stated:

> "Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise. That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable."

Appellant's contention that by imposing "the requirement of compulsory judicial review only upon unions representing voluntary hospitals" the statute (appellant does not cite any particular section) violates the First and Fourteenth Amendments, rests on nothing remotely resembling anything the Court below said. It did not require anyone, unions or hospitals, to seek judicial review. The Court merely held that the Industrial Commissioner and his appointees may not review certifications under Section 716 and that this section does not deprive non-profitmaking hospitals of the right of judicial review that employers generally have under Section 707 of the State Act and under Section 10(f) of the National Act. If the basis for this argument is that Section 713 restricts striking and picketing by unions of hospital employees, then it presupposes a decision with respect to that section that the Court below did not make and was not called upon to make. If and when the circumstances of a particular case call upon the Court to determine the validity of Section 713, it cannot be assumed that the Court will decide the case incorrectly, as appellant wishes this Court to assume. This applies, also, to appellant's contention in its Point 3 that Sections 713 and 716 deprive employees of voluntary hospitals of the equal protection of the laws.

Since the Court below did not hold that Sections 716 and 713 proscribe striking, picketing or publicity, it did not rule on the adequacy of Section 716 as a substitute for the right to strike or on the need for such a substitute.

II. The State Court did not pass on the questions the appellant is trying to raise and their resolution was in no way pertinent to the Court's decision.

As the New York Court of Appeals itself made clear, the only question before it, and the only question it decided, was whether Section 716 compelled the Hospital to submit to fact-finding and binding arbitration a controversy over appellant's representation status. Obviously, resolving that question of statutory construction could in no way

involve determining the meaning and constitutionality of that section or of a completely different section of the Labor Law if it should be invoked against the appellant at some time in the future and if the State court construed it as appellant seeks to have this Court construe it. Even where a State court says it passed on a particular federal question, this Court will not assume jurisdiction if, on examining the record, it fails to find the federal question was necessary to the decision. *Lynch* v. *New York,* 293 U. S. 52 (1934); *Honeyman* v. *Hanan,* 300 U. S. 14, 18 (1937). Here, the record is completely devoid of support for the claim that the Court of Appeals in any way passed on the constitutionality of the New York Labor Law's restrictions on strikes and picketing. Not only is no injunction against appellant's striking, picketing or publicizing now in effect; no such injunction has ever issued. *Cf., Oil Workers Unions* v. *Missouri,* 361 U. S. 363 (1960).

III. Appellant did not raise the alleged federal questions at the earliest opportunity in the State Court.

In its Jurisdictional Statement (page 10), appellant admits that it did not raise in the State courts the federal questions it now presents until after the Court of Appeals rendered its decision on the consolidated appeal. Appellant attempts to excuse this delay by claiming "surprise" at the Court's decision.

From the very beginning of this litigation, in each of the courts in which these cases were argued, appellee Hospital consistently contended that the fact-finding and arbitration provisions of Section 716 were not available to a union to resolve a controversy over the validity of the union's certification. Indeed, in June, 1966, long before the decision of the Court of Appeals in these cases, the Appellate Division held:

> "The disputes provision of section 716 of the Labor Law is not sufficiently broad to include a dispute over the right to exclusive representation by a union,

> the propriety of a bargaining unit, or any other issue raised as to the correctness of certification of an exclusive bargaining agent.'"*

Even if, as appellant now claims, such a construction of Section 716 would make Section 713's restrictions on strikes and picketing unconstitutional, by what tortuous reasoning can appellant now claim to be "surprised" that the determination of these cases presents such a constitutional issue?

While it may be that a sense of righteous self-confidence had lulled appellant into an unfounded optimism about the outcome of the litigation, surprise at finding oneself on the losing end of a legal argument is not the kind of "surprise" that justifies procrastinating until a motion for reargument to raise the federal questions that the construction of Section 716 is now claimed to pose.

IV. The State Court did not pass on the validity of any section of New York's Labor Law to which appellant refers in the questions it presents on this appeal.

28 U. S. C. 1257(2) grants to this Court jurisdiction to review final judgments or decrees of a State court:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The State court in this case did not rule on the *validity* of either section of the State statute that appellant claims this appeal involves. The decision of the New York Court of Appeals makes crystal clear that the Court held that Section 716 of the New York Labor Law, whether valid or not, was not intended to apply, and did not apply, to disputes concerning the representation of employees. Notwithstanding appellant's contending that the construction that the State court gave Section 716 makes both that Section and

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* 26 App. Div. 543 (1966).

Section 713 of the Labor Law unconstitutional, the fact remains that the Court did not and, indeed, had no need to pass on, the *validity* of either section, since it was not applying either one against any of the parties to these cases. As this Court had occasion to point out in *Ferry* v. *King County*, 141 U. S. 668, 673 (1891):

> "We have repeatedly held that the validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed."

In the present case, as the record clearly shows, appellant contended that Section 716 of the New York Labor Law authorized State officials to compel the Hospital to submit to fact-finding and arbitration procedures with respect to the Union's representative status. The Court of Appeals disagreed with appellant and decided that Section 716 was not intended to apply to the controversy these cases involve. It is inconceivable that in doing so the State court decided in favor of the validity of any relevant State statute.

Conclusion

For each of the reasons set forth above, appellee Hospital respectfully submits that the within appeal should be dismissed.

Respectfully submitted,

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APPENDIX

Relevant Statutory Provisions

New York Labor Law:

§ 702. Labor relations board

9. Notwithstanding the provisions of any other law, neither the industrial commissioner nor any board or other agency of the department of labor shall in any way direct, review, modify or reverse any decision or finding of the board nor shall the industrial commissioner or any board or other agency of the department of labor supervise or control the board in the exercise of any powers or in the performance of any duties under this article.

§ 703. Rights of employees

Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion of employers, but nothing contained in this article shall be interpreted to prohibit employees from exercising the right to confer with their employer at any time, provided that during such conference there is no attempt by the employer, directly or indirectly, to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by this section.

§ 704. Unfair labor practices

It shall be an unfair labor practice for an employer:

6. To refuse to bargain collectively with the representatives of employees, subject to the provisions of section seven hundred five.

§ 705. Representatives and elections

1. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted pursuant to this section shall be the exclusive representatives of all the employees in the appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that employees, directly or through representatives, shall have the right at any time to present grievances to their employer.

2. The board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization, to collective bargaining and otherwise to effectuate the policies of this article, the unit appropriate for the purposes of collective bargaining shall be the employer unit, multiple employer unit, craft unit, plant unit, or any other unit; provided, however, that in any case where the majority of employees of a particular craft, or in the case of a non-profitmaking hospital or residential care center where the majority of employees of a particular profession or craft, shall so decide the board shall designate such profession or craft as a unit appropriate for the purpose of collective bargaining.

3. Whenever it is alleged by an employee or his representative, or by an employer or his representative, that there is a question or controversy concerning the representation of employees, the board shall investigate such question or controversy and certify in writing to all persons concerned the name or names of the representatives who have been designated or selected. In any such investigation the board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section seven hundred six or otherwise, and may conduct an election by secret ballot of employees, or use any other suitable method to ascertain such representatives (either

before or after the aforesaid hearing), provided, however, that the board shall not have authority to investigate or determine any question or controversy between individuals or groups within the same labor organization nor between labor organizations affiliated with the same parent labor organization concerning the internal affairs of any labor organization but nothing contained in this proviso shall be deemed to preclude the board from investigating and determining which, if any, of affiliated groups or labor organizations have been designated or selected by employees as their representatives for the purposes of collective bargaining within the meaning of this article.

4. The board shall have power to determine who may participate in the election and to establish the rules governing any such election: Provided, that no election need be directed by the board solely because of the request of an employer or of employees prompted thereto by their employer, nor shall any individuals employed only for the duration of a strike or lockout be eligible to vote in such election; and provided further, that no such election shall be conducted under the employer's supervision, or, except as may be required by the board, on the employer's property, during working hours, or with his participation or assistance.

5. If at an election conducted pursuant to this section three or more nominees for exclusive collective bargaining representatives appear on the ballot and no one of them receives a majority of the votes cast at the election, the two nominees who received the highest number of votes shall appear on the ballot of a second election to be conducted hereunder, and the one receiving a majority of the votes cast at the second election shall be the exclusive representative of all the employees in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment.

6. A labor organization nominated as the representative of employees shall be listed by name on the ballots author-

ized by subdivision three of this section. In any investigation conducted by the board pursuant to this section the board may make a finding as to whether any committee, employee representation plan, or association of employees involved is a company union, and if any such committee, employee representation plan, or association of employees be found to be a company union, it shall not be listed on the ballots, certified or otherwise recognized as eligible to be the representative of employees under this article.

§ 706. Prevention of unfair labor practices

1. The board is empowered and directed, as hereinafter provided, to prevent any employer from engaging in any unfair labor practice. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

§ 707. Judicial review

1. The board shall have power to petition the supreme court of the state within the county wherein the unfair labor practice in question occurred or wherein any person charged with the unfair labor practice resides or transacts business, or if such court be on vacation or in recess, then to the supreme court of any county adjoining the county wherein the unfair labor practice in question occurred or wherein any person charged with the unfair labor practice resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was made and the findings and order of the board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restrain-

ing order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board.

2. No objection that has not been urged before the board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the board, its member, agent, or agency, the court may order such additional evidence to be taken before the board, its member, agent, or agency, and to be made a part of the transcript. The board may modify its finding as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations if any, for the modification or setting aside of its original order.

3. The jursidiction of the supreme court shall be exclusive and its judgment and decree shall be final, except that appeals shall lie to the appellate division of said court and to the court of appeals, in the manner and subject to the limitations provided in the civil practice act irrespective of the nature of the decree or judgment or the amount involved.

4. Any person aggrieved by a final order of the board granting or denying in whole or in part the relief sought may obtain a review of such order in the supreme court of the county where the unfair labor practice in question was alleged to have been engaged in or wherein such person

resides or transacts business by filing in such court a written petition praying that the order of the board be modified or set aside, or if such court be on vacation or in recess, then to the supreme court of any county adjoining the county wherein the unfair labor practice in question occurred or wherein any such person resides or transacts business. A copy of such petition shall be forthwith served upon the board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the board, including the pleading and testimony and order of the board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the board under subdivision one of this section, and shall have the same exclusive jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the board; and the findings of the board as to the facts shall in like manner be conclusive.

5. The commencement of proceedings under subdivisions one and four of this section shall not, unless specifically ordered by the court, operate as a stay of the board's order.

6. When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying and enforcing as so modified or setting aside in whole or in part an order of the board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by acts pertaining to equity jurisdiction of courts.

7. Petitions filed under this article shall be heard expeditiously and shall be considered and determined upon the transcript filed, without requirement of printing. Upon the filing of a record in the supreme court, the case shall be heard with greatest possible expedition, and shall take precedence over all other matters except matters of the same character.

§ 713. Limitations

Nothing in this article shall be construed so as to interfere with, impede or diminish in any way the right of employees to strike or engage in other lawful, concerted activities, except that it shall continue to be unlawful for the employees of a non-profitmaking hospital or residential care center, or their representatives, or any other persons to engage in or to induce or encourage, or to attempt to engage in or to induce or encourage any strike, work stoppage, slowdown or withholding of goods or services by such employees or other persons at such hospital or residential care center, provided, however, that nothing herein shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public that a grievance or dispute, as defined in section seven hundred sixteen of this article, exists at such hospital or residential care center, as long as such publicity does not have the effect of inducing any persons to withhold goods or services at such hospital or residential care center.

It shall be unlawful for a non-profitmaking hospital or residential care center to institute, declare or cause, or to attempt to institute, declare or cause any lockout of the employees of such hospital or residential care center.

§ 715. Application of article

The provisions of this article shall not apply to: (1) employees of any employer who concedes to and agrees with the board that such employees are subject to and protected by the provisions of the national labor relations act or the federal railway labor act; or (2) employees of the state or of any political or civil subdivision or other agency thereof; or (3) employees of any charitable, educational or religious association or corporation, no part of the net earnings of which inures to the benefit of any private shareholder or individual, except that the provisions of this article shall apply to (a) employees of any such charitable, educational or religious association or corporation whose

services are performed in connection with the operation of a building owned or operated by such an association or corporation and used or occupied as a commercial or industrial enterprise operated for the production of profit, irrespective of the purposes to which such profit may be applied, and which employees are not engaged in the charitable, educational or religious activities of such association or corporation and (b) employees of a non-profitmaking hospital or residential care center.

§ 716. Grievances and disputes in non-profitmaking hospitals and residential care centers

1. As used in this section "grievance" means any controversy or claim arising out of or relating to the interpretation, application or breach of the provisions of an existing collective bargaining contract. As used in this section "dispute" means all other controversies, claims or disputes between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center concerning wages, hours, union security, seniority or other economic matters, including, but not limited to, controversies, claims or disputes arising in the course of negotiating, fixing, maintaining, changing or arranging such terms or conditions.

2. Every collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center which does not contain provisions for the final and binding determination of grievances shall be deemed to include provision for the submission of such grievances, upon the request of either or both parties, to arbitration pursuant to such rules as may be established from time to time by the New York state board of mediation.

3. Every collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or resi-

dential care center which does not contain provisions for the final and binding determination of disputes shall be deemed to include provisions for:

(a) the appointment of a fact-finding commission by the New York state board of mediation upon the request of both parties to the dispute, or by the industrial commissioner upon his own motion and upon certification by such board that in its opinion efforts to effect a voluntary settlement of the dispute have been unsuccessful. Such fact-finding commission shall have all of the powers and duties, including the power to make recommendations for the settlement of the dispute, as are vested in a board of inquiry by article twenty-two of this chapter; and

(b) the submission of the dispute to arbitration, pursuant to such rules as may be established from time to time by the New York state board of mediation, by such board of mediation upon the request of both parties to the dispute, or by the industrial commissioner upon his own motion and upon certification by such board of mediation that in its opinion efforts to effect a voluntary settlement of the dispute have been unsuccessful.

4. In the absence of a collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center, the New York state board of mediation and the industrial commissioner may, in the manner and upon the conditions provided in subdivision three of this section, exercise all of the powers vested in them by the provisions of such subdivision of such section.

5. Nothing in this section shall be deemed to affect, impair or alter any collective bargaining contract between the employees of a non-profitmaking hospital or residential care center, or their representatives, and such hospital or residential care center which was executed prior to July first,

nineteen hundred sixty-three, during the term of such contract.

6. The supreme court shall have jurisdiction, to confirm, modify, correct or vacate any arbitration award made pursuant to the procedure established by this section, in the manner provided by article eighty-four of the civil practice act. The supreme court shall have jurisdiction, upon such notice as it deems appropriate, to restrain or enjoin any violation of the provisions of this section or section seven hundred thirteen and to grant such other and further equitable relief as may be appropriate. The provisions of section eight hundred seventy-six-a of the civil practice act shall not apply to an action or proceeding instituted pursuant to this section or section seven hundred thirteen.